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In the Supreme Court of the United States

CSU, L.L.C., PETITIONER

v.

XEROX CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record

A. DOUGLAS MELAMED
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY H. BLATTNER
Deputy Assistant Attorney General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
SUSAN M. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21PP

QUESTION PRESENTED

Whether a unilateral refusal to license or sell intellectual property protected by patent or copyright is absolutely immune from a claim of monopolization and attempted monopolization under Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Xerox manufactures, sells, and services photocopiers and printers. Pet. App. 3a. Petitioner CSU is an independent service organization (ISO) that specializes in servicing machines manufactured by respondent. Petitioner competes with Xerox in servicing Xerox products. *Id.* at 3a-4a. Before 1984, Xerox sold to ISOs parts necessary for repairing its products. *Id.* at 3a, 22a-23a. In 1984, Xerox established a policy of refusing to sell parts for its machines directly to ISOs. Xerox continued, however, to make parts for its machines available to authorized resellers and service providers and to end-users of

Xerox equipment. *Id.* at 3a, 22a-24a. In 1989, Xerox tightened enforcement of its policy to ensure that parts ordered by ISOs or their customers were actually intended for their own end-use, and not for use by ISOs in servicing others' Xerox machines. *Id.* at 3a. In addition, before 1991, Xerox machines came with diagnostic software installed, but subsequently Xerox unbundled the software and used its copyright to restrict ISO access to the software. *Id.* at 80a.

2. In 1994, CSU filed suit against Xerox,[1] alleging that Xerox violated Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, by monopolizing and attempting to monopolize the markets for service of Xerox high speed copiers and printers. Xerox counterclaimed for patent and copyright infringement. Pet. App. 4a.

Xerox moved for summary judgment on CSU's antitrust claims and its own counterclaims, contending that its unilateral refusal to sell or license patented parts and copyrighted software could neither violate Section 2 nor provide a basis for a patent or copyright misuse defense to its infringement claims. Pet. App. 4a. The district court initially denied those motions for summary judgment. *Id.* at 97a-124a, 78a-96a On Xerox's motion to reconsider, however, the district court granted summary judgment in favor of Xerox on CSU's antitrust claim with respect to Xerox's refusal to license patented parts and partial summary judgment on Xerox's patent-infringement counterclaims *Id.* at 17a-18a, 56a-77a. The district court held that "Xerox's

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[1] In 1994, Xerox settled an antitrust suit brought against it by a class of ISOs. Under the settlement, Xerox suspended its parts policy for 6 1/2 years and agreed to license its diagnostic software to ISOs for 4 1/2 years. CSU opted out of that settlement. Pet. App. 4a, 23a.

unilateral refusal to sell or license its patented parts cannot constitute * * * unlawful exclusionary conduct under the antitrust laws." *Id.* at 69a; see also *id.* at 74a. In denying CSU's motion for reconsideration, the court further held that "Xerox's refusal to license is expressly authorized by patent law and therefore immune from antitrust scrutiny." *Id.* at 40a. The district court subsequently extended those rulings to grant summary judgment to Xerox on CSU's antitrust claims based on Xerox's refusal to license its copyrighted materials as well as Xerox's counterclaim for copyright infringement. *Id.* at 16a, 21a-45a. After a trial to determine Xerox's damages on its copyright counterclaims, the district court entered an appealable judgment in favor of Xerox, and CSU appealed. *Id.* at 16a.[2]

3. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-14a. The court initially determined that the antitrust claims involving copyrighted materials were governed by Tenth Circuit law, but that Federal Circuit law governed the claims relating to patented parts. *Id.* at 5a-6a.

a. On CSU's claims relating to patented parts, the court first acknowledged that "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." Pet. App. 6a. The court nonetheless read its prior case law and Section 271(d) of the Patent Act, 35

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[2] Although CSU alleged that the prices at which Xerox sold patented parts to ISOs after the 1994 settlement (see note 1, *supra*) were intended to forestall competition from ISOs (Pet. App. 4a, 23a), the district court deemed that issue to have been resolved by its conclusion that Xerox's exercise of its unilateral right to refuse to sell or license patented products cannot constitute a violation of the antitrust laws. *Id.* at 74a-75a.

U.S.C. 271(d),[3] to establish that a patent holder generally has no obligation to license or sell its intellectual property, and that privilege is not negated by the antitrust laws. Pet. App. 6a-7a.

The court did note at least three established exceptions to the principle that a patent holder may enforce the right to exclude conferred by the patent without antitrust liability. First, a suit to enforce the statutory right to exclude is not exempt from the antitrust laws if the infringement defendant shows that the patent was obtained through fraud on the Patent and Trademark Office. Pet. App. 7a. Second, an infringement defendant may avoid liability by demonstrating that the infringement suit is a sham to cover an attempt to interfere with the business relations of a competitor. *Id.* at 7a-8a. Third, the court of appeals noted (*id.* at 8a) that, in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 457, 479-480 n.29 (1992) (*Kodak*), this Court stated that "power gained through some natural and legal advantage such as a patent, . . . can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next."

The court found none of those three exceptions applicable to this case, however. CSU had not alleged that Xerox obtained its patents through fraud or that Xerox's patent-infringement counterclaims were shams. Pet. App. 8a. As for the exception recognized in *Kodak*, the court stressed that *Kodak* "was a tying

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[3] Section 271(d) provides, in pertinent part: "No patent owner otherwise entitled to relief * * * shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having * * * (4) refused to license or use any rights to the patent."

case," whereas "there are no claims in this case of illegally tying the sale of Xerox's patented parts to unpatented products." *Ibid.* Thus, the court stated, *Kodak* merely "restat[ed] the undisputed premise that the patent holder cannot use his statutory right to refuse to sell patented parts to gain a monopoly in a market *beyond the scope of the patent*," and did not "limit the right of the patentee to refuse to sell or license in markets within the scope of the statutory patent grant." *Id.* at 9a. And, the court noted, it had already held that, "absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market." *Ibid.*

The court declined to align itself with the Ninth Circuit's subsequent decision after the remand in the *Kodak* case, *Image Technical Services, Inc.* v. *Eastman Kodak Co.*, 125 F.3d 1195 (1997) (*ITS*), in which that court held that (1) a unilateral refusal to license under a patent or sell patented goods may constitute exclusionary conduct in violation of Section 2 of the Sherman Act; (2) there is a rebuttable presumption that the exercise of the right to exclude constitutes a legitimate business justification; and (3) such a proffered business justification for the right to exclude is subject to a demonstration that it is pretextual. See Pet. App. 9a-10a. The Federal Circuit disagreed with the Ninth Circuit's approach on the ground that it "requires an evaluation of the patentee's subjective motivation for refusing to sell or license its patented products." *Id.* at 10a. Rather, the court stated, it would not inquire into the patent holder's subjective motivation for exerting his statutory rights, "even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent

grant." *Ibid.* Concluding that Xerox's refusal to sell its patented parts did not exceed the scope of the patent grant, the court affirmed the district court's dismissal of CSU's antitrust claim based on Xerox's refusal to sell or license those patented parts. *Id.* at 10a-11a.

b. The court reached a similar disposition of CSU's antitrust claims with respect to Xerox's refusal to sell or license its copyrighted materials. Pet. App. 11a-14a. The court noted that "the property right granted by copyright law cannot be used with impunity to extend power in the marketplace beyond what Congress intended." *Id.* at 11a. Thus, it cited *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), for the proposition that block-booking of copyrighted motion pictures is illegal tying in violation of the Sherman Act. See Pet. App. 11a. But, the court noted, this Court has not "directly addressed the antitrust implications of a unilateral refusal to sell or license copyrighted expression." *Ibid.*

The court found persuasive the approach of the First Circuit in *Data General Corp.* v. *Grumman System Support Corp.*, 36 F.3d 1147, 1187 (1994), in which that court held that, "while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." Pet. App. 12a. Although the Ninth Circuit, in *ITS*, had adopted a modified version of the First Circuit's *Data General* standard, which (as modified) permits a showing that "the defense and exploitation of the copyright grant was merely a pretextual business justification to mask anticompetitive conduct," *id.* at 13a, the court of appeals in this case found the First Circuit's original approach "more consistent with both the antitrust and the copyright laws," and concluded that it would most

likely be followed by the Tenth Circuit in considering "the effect of Xerox's unilateral right to refuse to license or sell copyrighted manuals and diagnostic software on liability under the antitrust laws." *Ibid.* In the absence of evidence "that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress," the court concluded that "Xerox's refusal to sell or license its copyrighted works was squarely within the rights granted by Congress to the copyright holder and did not constitute a violation of the antitrust laws." *Id.* at 14a.

DISCUSSION

Whether the unilateral refusal to sell or license intellectual property protected by a patent or copyright may constitute a violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, is an important issue that may well warrant this Court's resolution in an appropriate case. But precisely because that issue has such broad potential implications, it is particularly important that this Court choose the appropriate vehicle for resolution of the difficult questions implicated by the intersection of antitrust law and intellectual property law. In our view, this case does not present that vehicle.

First, there are significant ambiguities in the decision below about the applicability of antitrust law to intellectual property. Unlike petitioners, we do not believe the Federal Circuit's decision must be read as holding that no Section 2 claim may ever be based on the unilateral refusal to sell or license such intellectual property (even setting aside the three circumstances expressly recognized by the court of appeals in its decision in which an antitrust claim could be based on

such a unilateral refusal to deal). While it is conceivable that the court of appeals intended to go that far, its opinion does not compel that conclusion, and that uncertainty makes this case an undesirable one for resolving the important issues presented.

Second, the actual extent of the disagreement between the Federal Circuit's decision in this case and the Ninth Circuit's decision in *ITS*, *supra*, is not clear. Indeed, it is not clear how this case would have been decided in the Ninth Circuit. We therefore suggest that the Court would benefit from further percolation of these difficult issues in the courts of appeals.[4]

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[4] The Question Presented by the petition (Pet. i) raises not only the issue of antitrust liability, but also the doctrines of patent misuse and copyright misuse. The body of the petition, however, does not address in detail the doctrines of patent and copyright misuse, nor does it identify any conflict among the circuits regarding any misuse issue. The court of appeals rejected petitioner's allegations of patent misuse in a footnote, stating only that, "[h]aving concluded that Xerox's actions fell within the statutory patent grant, we need not separately consider CSU's allegations of patent misuse and they are rejected." Pet. App. 10a n.2; see *id.* at 7a (discussing Section 271(d) of the Patent Act). The court of appeals did not address copyright misuse at all. We therefore limit our discussion in this brief to antitrust liability.

In addition, our focus in this brief is on antitrust claims based on the refusal to sell or license matters protected by a patent, although our observations also apply to the refusal to sell or license copyrighted materials. The antitrust immunity recognized by the court of appeals for the refusal to sell or license patented materials is at least as broad as that for the refusal to sell or license copyrighted materials. Moreover, the statutory rights afforded a copyright holder are generally less expansive than those enjoyed by a patent holder. See *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (noting that Congress "has never accorded the copyright owner complete control over all possible uses of his work"). But in general, the "governing antitrust

1. Both the Federal Circuit in this case and the Ninth Circuit in *ITS* recognized that (a) the holders of patents and copyrights have broad rights to refuse to sell or license their works, and that (b) intellectual property rights do not confer a privilege to violate the antitrust laws. See Pet. App. 6a ("Intellectual property rights do not confer a privilege to violate the antitrust laws. But it is also correct that the antitrust laws do not negate the patentee's right to exclude others from patent property.") (citation and internal quotation marks omitted); *ITS*, 125 F.3d at 1215 ("Two principles have emerged regarding the interplay between these laws: (1) neither patent nor copyright holders are immune from antitrust liability, and (2) patent and copyright holders may refuse to sell or license protected work."). But with respect to antitrust claims based on the unilateral refusal to sell or license property, the central issue in this case, the Federal Circuit's opinion is susceptible of varying interpretations. The Federal Circuit did state that, "[i]n the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws." Pet. App. 10a. Almost immediately thereafter, however, the court stated that evaluation of a patentee's motivations in refusing to deal would not be appropriate "so long as [the]

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principles are the same" for patents and copyrights. U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.1 (1995). Moreover, this Court has recognized the "historic kinship between patent law and copyright law," *Sony Corp.*, 464 U.S. at 439. Accordingly, for antitrust purposes, we perceive no basis for distinguishing between a patent holder's and a copyright holder's unilateral refusal to deal.

anticompetitive effect [of refusing to sell or license a patented invention] is not illegally extended beyond the statutory patent grant." *Ibid.*

If the Federal Circuit had clearly held that a refusal to sell or license property protected by a valid patent may never be the basis of an antitrust violation except in the circumstances of an illegal tying arrangement (as discussed in this Court's opinion in *Kodak*, 504 U.S. at 479-480 n.29), we would have serious concerns about such a holding and would not be prepared to endorse it. Exemptions from the antitrust laws are "strongly disfavored." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986); see *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388 (1981). That well-established principle reflects the fundamental importance of the antitrust laws as an element of national economic policy. It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Moncari*, 417 U.S. 535, 551 (1974).

Moreover, the antitrust laws, properly construed, afford ample scope for the exercise of lawfully obtained intellectual property rights. A patentee's basic right is defined by statute as "the right to exclude others from making, using, or selling the invention throughout the United States." 35 U.S.C. 154(a)(1). That right to exclude is the essence of a patent grant.[5] But the right to

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[5] See, *e.g.*, *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 215 (1980); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969); *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908); *Bloomer* v. *McQuewan*, 55 U.S. (14 How.) 539, 549 (1852); cf. *Fox Film Corp.* v. *Doyle*, 286

exclude others is no less "one of the most essential sticks in the bundle of rights that are commonly characterized as property," even when the property in question is tangible property. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Consolidated Fruit Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1896) ("A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions.").

The antitrust laws generally permit those whose efforts have advanced the common well-being to benefit fully from their contributions. Thus, a lawful monopolist is perfectly free under the antitrust laws to charge monopoly prices, without regard to whether the monopoly derives in part from intellectual property. Like the intellectual property laws, the antitrust laws applaud "skill, foresight and industry," *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.), and do not penalize lawful monopoly by preventing its exploitation. And under the antitrust laws, a firm ordinarily may choose with whom it will do business, without regard to whether the doing of business is the licensing or sale of intellectual property. See *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *United States* v. *Colgate*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal.").

In addition, a lawful monopolist could properly be held liable under Section 2 for a refusal to deal only if it

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U.S. 123, 127 (1932) (noting copyright owner's "right to exclude others from using his property").

had monopoly power *and* if its refusal to deal sacrificed profit available from exercising that monopoly power in order to exclude competition and thereby to create additional market power—only if, in other words, it sought to enlarge its monopoly by "attempting to exclude rivals on some basis other than efficiency." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (internal quotation marks omitted). Conduct generally does not violate Section 2 if it does not involve a sacrifice of profits in order to exclude competition and thereby create market power. See Robert H. Bork, *The Antitrust Paradox* 144 (2d ed. 1993) (defining predation as conduct "that would not be considered profit maximizing except for the expectation" of a resulting reduction in competition). Accordingly, the antitrust laws usually permit monopolists, if lawful, broad license in refusing to deal with others.

Given that there are only limited circumstances in which *any* lawful monopolist's refusal to deal may constitute a violation of the antitrust laws, we do not believe that it is necessary to construe either the Patent Act or the Sherman Act as making patent holders immune from liability under Section 2.[6] Yet we also do not believe that the court of appeals' decision

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[6] The court of appeals relied on Section 271(d) of the Patent Act, which provides that "[n]o patent owner * * * shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having * * * (4) refused to license or use any rights to the patent." 35 U.S.C. 271(d). On its face, however, that provision does not address antitrust liability for monopolization or attempted monopolization by refusal to deal. See *ITS*, 125 F.3d at 1214 n.7 (noting that the language of Section 271(d) does not compel a reading precluding antitrust liability, although it does "indicate congressional intent to protect the core patent right of exclusion").

must be read as adopting such a holding. The court of appeals' decision expressly recognized, for example, that a patent holder that attempts to expand the scope of its monopoly by tying its patented product to some other product or service, over which it did not have a lawful monopoly, may be found to have engaged in a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1 (1994 & Supp. IV 1998). See Pet. App. 8a-9a. The court of appeals thus recognized the fundamental principle, reiterated by this Court in *Kodak* (504 U.S. at 480 n.29), that "power gained through some natural and legal advantage such as a patent, * * * can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next." Pet. App. 8a (citation and internal quotation marks omitted).[7] See also Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 704.1, at 229 (Supp. 2000) (discussing potential antitrust liability from refusals to license intellectual property in conditions such as price fixing, reciprocity, and exclusive dealing).

Much the same might well be true, for example, in a Section 2 case where the patent holder, although not engaging in an express tying arrangement like that alleged in *Kodak*, had nonetheless sought to accomplish a similar result by restricting the sale or license of its patented product to those customers who had also demonstrated their willingness to purchase from it another product or service over which it did not have a

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[7] The court of appeals also read its prior case law as holding that a patent may confer the right to exclude competition in more than one antitrust market "absent exceptional circumstances" (Pet. App. 9a)—a potentially significant exception that might well include the circumstances discussed in the text following this footnote.

lawful monopoly. See *United States* v. *Griffith*, 334 U.S. 100, 108 (1948) ("Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined."); *Leitch Mfg. Co.* v. *Barber Co.*, 302 U.S. 458, 463 (1938) ("[E]very use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited. * * * [The prohibition] applies whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly."); see also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 136 (1969) (patentee may not "extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings"). We do not read the court of appeals' opinion as holding that no claim of monopolization or attempted monopolization under Section 2 could be made out in such a case, and this case does not in any event present such facts.

2. The court of appeals in this case rejected the Ninth Circuit's decision in *ITS*, which upheld a jury verdict in favor of an antitrust plaintiff in a similar Section 2 monopolization case, on the ground that the Ninth Circuit, by making the assertion of the intellectual-property right to exclude only a presumptively valid business justification subject to rebuttal by an antitrust plaintiff, improperly permitted "an evaluation of the patentee's subjective motivation for refusing to sell or license its patented products for pretext." Pet. App. 10a. In *ITS*, the Ninth Circuit ruled that the district court should have instructed the jury that Kodak's protection of its patent rights was a "presumptively valid business justification" for its refusal to sell those parts to ISOs competing with

Kodak in the service market. 125 F.3d at 1218. The Ninth Circuit also held, however, that the failure to give such an instruction was harmless error on the facts of that case, because the record clearly demonstrated that Kodak's policy of refusal to sell parts to ISOs extended well beyond patented parts. The Ninth Circuit distinguished other appellate decisions that had found patent holders immune from antitrust liability for the refusal to license a patent because, unlike those cases, *ITS* concerned "a blanket refusal that included protected and unprotected products." *Id.* at 1219. The Ninth Circuit therefore concluded that the jury would have had to reject Kodak's proffered defense of patent protection even under proper instructions, because the exercise of the right to exclude granted by the patent was not the actual basis for Kodak's actions in the marketplace.[8]

In light of the Ninth Circuit's reliance in *ITS* on the fact that Kodak's policy of refusal to deal extended to unpatented parts, it is not clear how this case would have been decided by that court. The district court in this case specifically noted, when it entered summary

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[8] In *ITS*, the Ninth Circuit also held that, although Kodak's refusal to sell parts to ISOs was a violation of Section 2, Kodak was entitled to condition such sale on "any nondiscriminatory price that the market will bear." 125 F.3d at 1226. The Ninth Circuit therefore reversed the district court's injunction insofar as it required Kodak to make its patented parts available for sale at reasonable prices. In the decision below, however, the Federal Circuit did not address the validity of any condition that might be placed on the sale or license of patented parts or copyrighted materials. This case, therefore, does not present the Court with an appropriate vehicle to determine whether or to what extent Section 2 restricts the conditions under which a monopolist patent or copyright holder may sell or license its protected materials.

judgment in favor of Xerox on CSU's antitrust claims, that "CSU concedes that it cannot prove antitrust injury premised on Xerox's refusal to sell unpatented parts because its damages are based on an alleged unavailability of critical parts, including patented parts, copyrighted manuals, and patented and copyrighted diagnostic software." Pet. App. 16a. But the Ninth Circuit in *ITS* ruled that Kodak's refusal to sell unpatented parts established that that case had been decided properly by the jury. The Ninth Circuit did not indicate whether the jury might properly have found in *ITS* that Kodak's refusal to sell patented parts alone to the ISOs would have constituted a Section 2 violation. Moreover, the Ninth Circuit in *ITS* distinguished one of its own prior cases, *United States* v. *Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (1981), in which it found no antitrust violation where the patent holder decided merely "to license some of its patents and refuse to license others" (see *ITS*, 125 F.3d at 1216). In light of CSU's concession that Xerox's refusal to sell unpatented parts had no anti-competitive significance, it is thus possible that the Ninth Circuit might have affirmed the district court's decision in this case to enter summary judgment for Xerox.

In light of the considerable uncertainty about the scope of both the decision below and the Ninth Circuit's decision in *ITS*, we suggest that the Court allow these difficult issues to percolate further in the courts of appeals. The courts of appeals may harmonize their approaches upon further reflection, and in light of additional factual variations, or they may make their differences more clear, in which case this Court's review may eventually be warranted. At this stage, however, we submit that the issues presented by this case are not ripe for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

A. DOUGLAS MELAMED
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY H. BLATTNER
Deputy Assistant Attorney General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
SUSAN M. DAVIES
Attorneys

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